IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1166

MILTON CLARK, FREDERICK W. ROST, ST. REGIS APARTMENTS, LTD., *A California limited partnership;* MELVIN BALSER, *Managing Agent, on behalf of themselves and all others similarly situated;*

PHILADELPHIA GAS WORKS,

Plaintiff-Intervenor, Petitioner

v.

GULF OIL CORPORATION
and
TEXAS EASTERN TRANSMISSION CORPORATION

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY PHILADELPHIA GAS WORKS

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To The Supreme Court of the United States,

Gulf Oil Corporation ("Gulf"), a Respondent herein, files this brief in opposition to the Petition for a Writ of Certiorari filed by Philadelphia Gas Works ("PGW").

COUNTER STATEMENT OF THE CASE

This case involves the limited issue whether a private cause of action should be implied under the Natural Gas Act. The opinion of the Third Circuit Court of Appeals[1]

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[1] This opinion is set out in full as Appendix A to PGW's Petition. References herein to Appendices are to the Appendices A, B, C and D (*e.g.* "App. A, p. ......") to PGW's Petition, which was filed in this Court by PGW on February 17, 1978.

sets forth the facts relevant to a consideration of the issue presented to this Court, including an analysis of Federal Power Commission Opinion Nos. 780 and 780-A, *aff'd*, *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588 (3rd Cir. 1977), *cert. denied*, 46 U.S.L.W. 3520 (February 21, 1978) ("*Gulf* v. *FPC*").

In its Petition for a Writ of Certiorari ("Petition") PGW asserts in its Statement of the Case that this is a "companion case" to that of *Gulf* v. *FPC* (Petition, p. 3). From this and similar statements PGW argues in its Petition that the relief sought in this case should be viewed as a "permissible supplement to Commission action" in *Gulf* v. *FPC* (Petition, p. 12). PGW's argument begs the question, whether the existence of a private cause of action under the Natural Gas Act is consistent with the underlying purpose of the regulatory scheme of the Act. The Third Circuit, citing cases by this Court which are clearly authoritative on the question, refused to create a private cause of action. PGW's attempt to convince this Court that these two cases should be aggregated and the relief viewed as "supplemental" underscores what would be a basic inconsistency for this Court to create a private cause of action under the Natural Gas Act while at the same time refusing to review Opinion Nos. 780 and 780-A, in which the Commission adopted a "formula" which "is designed to relieve Texas Eastern and the consumers of their additional costs caused by non-delivery of the Gulf gas, insofar as these costs may be generally related to Commission approved gas transactions." Opinion No. 780-A, *Gulf* v. *FPC*, App. E, p. 110a.[2]

[2] The opinions of the Federal Power Commission and the opinion of the Court of Appeals in *Gulf* v. *FPC* are set forth in Appendices to Gulf's Petition for Writ of Certiorari, *Gulf Oil Corp.* v. *Federal Energy Regulatory Commission*, No. 77-596. Those Appendices are cited herein as "*Gulf* v. *FPC*, App." and references are to the page numbers as used therein (*e.g.* "*Gulf* v. *FPC*, App. A, pp. ...."). References herein to the "Commission" are to the Federal Power Commission or its successor the Federal Energy Regulatory Commission.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT COURT PROPERLY HELD PETITIONER HAS NO PRIVATE CAUSE OF ACTION UNDER THE NATURAL GAS ACT.

The Third Circuit found that the implication of a private cause of action under the Natural Gas Act would conflict with the Congressional policy of providing uniform federal regulation under the Act and seriously interfere with the Commission's exercise of its jurisdiction under the Act. In making this finding, the Third Circuit applied the tests laid down by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975), and decided that this case did not meet at least two of those four tests.[3] Specifically, the Third Circuit found that the second and third tests of *Cort* were not satisfied.

[3] The Third Circuit had difficulty in determining the relief sought by the plaintiffs in this case, but viewed Clark, Thompson and PGW as seeking:

> ". . . immediate monetary relief to cover fully the costs PGW incurred in securing replacement gas over and above the limited monetary relief afforded by the FPC. As with the monetary relief secured from the FPC, PGW concedes the necessity of restoring such amounts to Gulf based on the timetable set forth by the FPC in Opinion No. 780." *Clark* v. *Gulf*, App. A, p. A14

For the relief which PGW seeks to be granted, a court must have the power to set rates, otherwise recoupment of the "refunds" could not be obtained. This Court has held that federal courts do not have jurisdiction to set rates for which natural gas is sold for resale in interstate commerce, this being a special prerogative entrusted by Congress to the Commsision in its determination of the public interest. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). Thus, if a District Court ordered Gulf to pay damages for a purported violation of the Act, it could not order the recoupment of those damages by a rate increase to Gulf, which PGW's refund formula would mandate. Given the unusual nature of the requested relief, the Third

The second test in *Cort* is whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?" 422 U.S. at 78. In answering this question, the Third Circuit thoroughly examined PGW's and *Clark, et al's* argument concerning Congressional intent and properly rejected it.

It has long been established that Congress in drafting the Natural Gas Act ". . . was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake." *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 113 (1958); *Amoco Production Co.* v. *FPC*, 465 F.2d 1350 (10th Cir. 1972). This Court has long recognized that "Congress has entrusted the administration of the Act to the Commission not to the courts." *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 617 (1944). In *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 634-35 (1972), this Court found that ". . . the desirability of uniform federal regulation is abundantly clear" (406 U.S. at 634-35), and concluded that the Commission, not the courts, had jurisdiction to resolve the problems arising under the Act. See also *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961); *Atlanta Gas Light Co.* v. *Southern Natural Gas Co.*, 338 F. Supp. 1039, 1045 (N.D. Ga. 1972), *aff'd in part and specifically as to this point, rev'd in part on other grounds, sub nom. Atlanta Gas Light Co.* v. *FPC*, 476 F.2d 142 (5th Cir. 1973); *Amoco Production Co., supra*, 465 F.2d at 1355.

Circuit viewed the fourth test of *Cort, i.e.*, whether the cause of action is one appropriately relegated to state law, as unimportant since a court could not grant such relief.

In an attempt to counter the fact that Congress has entrusted the administration of the Act to the Commission, not to the courts, PGW asserts that similarities between Section 27 of the 1934 Securities & Exchange Act (15 U.S.C. § 78aa) and Section 22 of the Natural Gas Act (15 U.S.C. 717u) evince "a congressional intent to create an implied private cause of action" (Petition, p. 10).

The error of attempting to rely on an isolated similarity between the Securities and Exchange Act of 1934 (Section 27) and the Natural Gas Act (Section 22) is well demonstrated by the opinion of the Third Circuit in *Clark* v. *Gulf* (App. A, pp. A15-16) and the opinions of this Court in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977) (holding no private cause of action under the same section of the Securities Act (Section 10b) as the one involved in *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964)), and *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) (holding no private cause of action under a different section of the Securities Act (Section 14e) as involved in *Santa Fe*).

PGW's next assertion is that "private remedies are implied because of *practical* limitations upon the regulatory effectiveness of the federal agencies" (Petition, p. 11) and that the Third Circuit "apparently ignored the practical limitations" (Petition, p. 11), since it found that there existed no private cause of action under the Natural Gas Act.

The Third Circuit did not ignore the practical limitations on the Commission's exercise of its authority under the Act,[4] but rather found that the Commission's responsibili-

[4] At PGW's request, the same panel of the Third Circuit heard *Clark* v. *Gulf* that had decided *Gulf* v. *FPC*. The panel was obviously well versed in Opinion Nos. 780 and 780-A and cognizant of the action taken by the Commission therein and the disturbing effect that the invention of a private cause of action would have on the delicate balance of the "public interest" struck by the Commission in Opinion Nos. 780 and 780-A.

ties under the Act would become "unmanageable" by inferring private causes of action for the millions of consumers and their distributors in the federal district courts through whose jurisdictions flowed the natural gas sold by Gulf to Texas Eastern.[5]

A case in point is *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974), wherein this Court was faced with the problem whether a private cause of action should be implied under Section 307(a) of the Rail Passenger Service Act ("Amtrak Act") of 1970 (45 U.S.C. § 547(a)). Under the Amtrak Act the National Railroad Passenger Corp. ("Amtrak") was granted broad authority to resolve the national problem of the deteriorating inter-city passenger train service.[6] This Court refused to imply a private cause of action, holding that implication thereof would be inconsistent with Congressional intent, since "Congress clearly did not intend to replace the delays often inherent in the administrative proceedings contemplated by § 13a of the Interstate Commerce Act with the probably even greater delays inherent in multiple federal court proceedings. Instead, it clothed the

[5] In *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court held that the Commission, under the Natural Gas Act, not the courts, should exercise curtailment jurisdiction over direct sales of gas in interstate commerce. In *Virginia* v. *Tenneco, Inc.*, 538 F.2d 1026 (4th Cir. 1976), the Fourth Circuit was faced with the problem whether a federal court had jurisdiction to entertain an action against a natural gas company filed by the Commonwealth of Virginia, seeking in a private action to enforce certain provisions of the Act. The Fourth Circuit analyzed the history of the Act and concluded that no jurisdiction existed because of the need for uniform federal regulation in the natural gas area.

[6] Similarly, the Commission must resolve the "phenomena of a short supply of natural gas", *Virginia* v. *Tenneco, Inc.*, 538 F.2d 1026, 1031 (4th Cir. 1976), which is a national problem which requires a uniform federal resolution. See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

Attorney General with the exclusive (except in cases involving labor agreements) authority to police the Amtrak system and to enforce the various duties and obligations imposed by the Act." 414 U.S. at 464.

By the Natural Gas Act (as in the Amtrak Act), Congress invested the Commission with jurisdiction and clothed it with the exclusive authority to administer the Act, *i.e.*, grant certificates (*FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972)), set rates (*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)), and approve abandonments (*Reynolds Metal Co.* v. *FPC*, 534 F.2d 379 (D.C. Cir. 1976)); and to enforce the Act, *i.e.*, by the Commission's bringing actions in federal district courts (15 U.S.C. § 717s). Using the well established principle of statutory construction "that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies" (*National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974)), the finding that Congress entrusted the administration and enforcement of the Natural Gas Act to the Commission establishes that no private cause of action can be implied under the Act.

PGW would have the Court disregard this clear showing of Congressional intent, by construing the Commission's pronouncements in Opinion No. 780-A as "approval of PGW pursuing a private cause of action." (Petition, p. 11). Having constructed its "strawman", PGW then accuses the Third Circuit of "disregarding" it (Petition, p. 11). Of course, the same panel of the Third Circuit that decided *Gulf* v. *FPC*, did not disregard any Commission pronouncement in Opinion No. 780-A, but simply could not construe Opinion No. 780-A as constructing the strawman in the first instance. The Commission's statement in Opinion No. 780-A that it took no position with respect to the merits of other

proceedings can hardly be stretched to an approval of such other proceedings, much less a statement by the Commission that a private right of action under the Natural Gas Act should be created.[7]

In short, the Congressional intent exhibited by the Act would be obliterated, rather than assisted, by private enforcement of what is a national problem, which Congress intended to solve by a comprehensive national regulatory scheme entrusted to the Commission, and which scheme ". . . did not contemplate a private cause of action for damages by retail customers whenever a regulated natural gas company breached its certificate of public convenience and necessity under the Natural Gas Act." *Clark* v. *Gulf*, App. A, p. A19.

Having failed the second test of *Cort*, PGW next turns to the Third Circuit's analysis of the third *Cort* test. The inquiry under this test is whether implication of a private cause of action is consistent with the underlying purpose of the legislative scheme. The Third Circuit concluded "that it is not consistent with the underlying purpose of the regulatory scheme to imply a private remedy in damages for a breach of the Act", *Clark* v. *Gulf*, App. A, p. A22, and that the implication of such a cause of action could disrupt, seriously disable and possibly destroy the uniform regulatory scheme devised by Congress. PGW does not even dispute the Third Circuit's conclusion that implication of

[7] See *Piper* v. *Chris-Craft Indus.*, 430 U.S. 1, 41 n.27 (1977). There this Court admonished the Securities and Exchange Commission for taking a position on the issue of implication of a private right of action. In *Piper* this Court held that ". . . 'the narrow legal issue' of implying a private right of action under the securities laws was 'one peculiarly reserved for judicial resolution' . . ." *E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54 n. 13 (1977). Thus, the invocation of the "administrative deference" rule is inappropriate. *Piper, supra.*

a private cause of action would inevitably lead to conflicting decisions between the courts and the Commission, making the Commission's responsibilities under the Act unmanageable, but merely once again raises its "strawman" of Commission approval of its cause of action. As explained previously, the Commission did not approve a private right of action in this case, and has in other contexts vigorously contested the creation of a private cause of action under the Natural Gas Act as creating a clear and present danger to its administration of national energy policy. See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *Virginia* v. *Tenneco, Inc.*, 538 F.2d 1026 (4th Cir. 1976).

As an alternative, PGW urges the Court to "decide that a private action may be maintained only in specified situations, to-wit, an administrative determination that the Act has been violated." (Petition, p. 13). The Third Circuit expressly rejected PGW's alternative solution and found that "The conclusion we reach is especially applicable to the instant case because of the limited nature of the relief sought by plaintiffs." *Clark* v. *Gulf*, App. A, p. A22.

Moreover, the cacophony of the different types of relief which might be sought by the multitude of claimants if a private right of action is granted under the Act, even in this "specified" circumstance, will mock and thwart Congress' intent that the Commission administer the Act. Even PGW concedes that "potential for conflict exists" (Petition, p. 13), and this is strikingly illustrated in this case.

The Commission found in *Gulf* v. *FPC* that the public interest lay in Gulf's ultimately delivering the full volume of gas provided for under its gas purchase contract with Texas Eastern Transmission Corp. ("Texas Eastern") by agreeing with certain of the parties' "strenuous objections" to "any procedure which will relieve Gulf of its obligation,"

Opinion No. 780-A, *Gulf* v. *FPC*, App. E, p. 106a. In this connection the Commission found that "Further, if the refund represented compensation for ultimate failure to deliver gas rather than delay in delivering gas, Gulf would be relieved of its obligation to deliver the gas for which the refund represented compensation." Opinion No. 780-A, *Gulf* v. *FPC*, App. E, p. 106a. The Commission therefore made provision in its Order for recoupment of the so-called "refunds" upon Gulf's delivery of the make-up volumes, and accomplished this by adjustment of Gulf's rates for such volumes.[8]

PGW, mindful of the Commission's determination that the "public interest" will be served by delivery of all the gas, and emulating the Commission's attempt to avoid the rule that one cannot have specific performance and damages for the same obligation, states that "the relief received would be repaid to Gulf upon Gulf's future performance."

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[8] The proceeding initiated on November 7, 1975, by the Commission issuing the "Order to Show Cause" has not terminated. If the Commission's Orders are sustained, the proceeding is an ongoing one. In Opinion Nos. 780 and 780-A, the Commission has required Texas Eastern, after survey of its customers, to prepare and submit for the Commission's approval:

> "a plan for the flow-through of the refunds herein ordered to be disbursed indicating the amount payable to each jurisdictional customer, the basis used to compute the amount payable, and the periods involved." Ordering Paragraph (E), Opinion No. 780, *Gulf* v. *FPC*, App. D, p. 90a.

The Commission then stated that Texas Eastern's customers ". . . themselves had a variety of responses ranging from purchases of additional supplies to conversion at additional expense, to simple curtailment or non-use. All of these matters will be addressed in the proceeding for distribution of refunds." Opinion No. 780-A, *Gulf* v. *FPC*, App. E, p. 104a. There can be little doubt that the creation of a private cause of action would seriously complicate and very possibly destroy this refund flow-through proceeding since the disruptive factor of courts increasing, or diminishing, on a piecemeal basis, the amount of "refunds" or the volumes of natural gas to be delivered would also have to be considered in such proceeding.

(Petition, p. 13). Apart from the myriad of difficulties inherent in such an approach, and the problems that would be created by other customers of Texas Eastern seeking different types of relief, PGW could only repay such amounts by increasing its rates to its customers, and the authority of this regulated public utility to make such a promise and fulfill it is far from assured.

Indeed PGW would place a court in an impossible situation. A court cannot increase the rates at which a producer sells natural gas for resale in interstate commerce (See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)), and, therefore, it simply could not grant the relief that PGW seeks, because it would entail an increase in the Gulf-Texas Eastern certificated price. Even PGW recognizes (by its meaningless offer) that if it were awarded damages without such a recoupment Gulf would be relieved of its obligation to deliver the full 4.4 TCF volume (thus thwarting the Commission's determination of the public interest).

The court below was therefore correct in holding:

> "Under these conditions, an implied cause of action for damages does not add significant additional protection for ultimate consumers of gas but might well disrupt the congressional scheme devised for the regulation of an essential industry and the protection of the public generally." *Clark* v. *Gulf*, App. A, p. A22.

II. THERE IS NO CONFLICT SINCE FARMLAND IS NOT APPLICABLE, AND IS NOT AUTHORITY FOR IMPLICATION OF A PRIVATE RIGHT OF ACTION.

The case relied upon by PGW as establishing a conflict between the circuits is *Farmland Industries, Inc.* v. *Kansas-Nebraska Natural Gas Co.*, 486 F.2d 315 (8th Cir. 1973).

On its facts, *Farmland* has no application here. In that case, Farmland Industries, Inc., the direct industrial customer of an interstate pipeline company, Kansas-Nebraska, was supplied natural gas for boiler fuel purposes pursuant to a contract. Since this was a direct sale of interstate gas, Commission certification was required and obtained only for transportation, the Commission having under such circumstances no rate-setting jurisdiction. In accordance with a cancellation clause in the contract, Kansas-Nebraska cancelled it when Farmland refused to accept a higher price for the gas.

Thereafter, Kansas-Nebraska ceased delivery of this gas. After the expiration of approximately three weeks, and only after Farmland had entered into a new contract at a higher rate, did Kansas-Nebraska resume deliveries. Farmland sued Kansas-Nebraska, alleging, *inter alia*, a right to recover damages for an alleged "abandonment" of "service" under Section 7(b) of the Act during the period of cessation of gas deliveries. The holding by the court was very limited, to the effect that a party seeking relief solely under a section of the Act, with no material contractual relationship with anyone or other basis for relief, had a remedy. Here PGW (and Clark, *et al.*) admittedly have contractual relationships with each of their respective gas suppliers, and the damage and specific performance relief which they seek is contractual in nature, and is not aided by, but independent of, any section of the Act.[9]

[9] As the court held in *Eastern Shore Natural Gas Co.* v. *Stauffer Chemical Co.*, 298 A.2d 322 (Del. Sup. 1972):

> "The allegation of Eastern is that by reason of Stauffer's breach of contract. Eastern may be violating the Gas Act. Clearly, the claim of such breach of contract and consequence are not within the scope of 15 U.S.C., § 717 u [Section 22 of the Act]. The presence of a federal question does not necessarily create a federal case." *Id.*, 298 A.2d at 326.

PGW strains to use *Farmland* as precedent, on the theory that Gulf was guilty of "abandonment" under Section 7(b) of the Act. In *Gulf* v. *FPC*, the Commission determined that Gulf had failed to deliver the quantity of natural gas required under its certificate. However, the Commission had presented to it whether such failure constituted an "abandonment" by Gulf within the meaning of Section 7(b) of the Act and refused to so find,[10] because Gulf simply had not "abandoned" its certificated service. The Third Circuit reviewed the opinion of the District Court in *Farmland* and found that the utility there, "unlike Gulf in the instant case, had *permanently* ceased delivery of all gas at the expiration of their gas purchase contract. Thus, the finding of abandonment was predicated upon the *permanent* cessation of all service at the expiration of the contract term without Commission approval." *Clark* v. *Gulf*, App. A, p. A20.

Gulf has consistently stated before the Commission and before the Courts below that it intends to deliver the entire 4.4 TCF volume of natural gas.

PGW relies on *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942 (6th Cir.

For similar conclusions see *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961); *Northern Natural Gas Co.* v. *Cities Service Oil Co.*, 182 F.Supp. 155 (S.D. Iowa 1959); *Landon* v. *Northern Natural Gas Co.*, 338 F.2d 17 (10th Cir. 1964), *cert. denied*, 381 U.S. 914 (1965); *Saturn Oil & Gas Co.* v. *Northern Natural Gas Co.*, 359 F.2d 297 (8th Cir. 1966); *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937 (1962); *McClellan* v. *Montana-Dakota Utilities Co.*, 104 F. Supp. 46 (D. Minn. 1952), *aff'd.* 204 F.2d 166 (8th Cir. 1953), *cert. denied*, 346 U.S. 825 (1953); and *Glassberg* v. *Boyd*, 116 A.2d 711 (Del. Ch. 1955).

[10] Neither PGW, its customers, nor anyone else, in *Gulf* v. *FPC* sought review before the Third Circuit of the Commission's determination that Gulf's purported failure to deliver natural gas under its certificate did not constitute an abandonment of Gulf's certificated service under Section 7(b) of the Act.

1949) (Petition, p. 15). But in *Panhandle,* it is clear that the reduction in service (unlike in *Gulf* v. *FPC*), if it had occurred as was threatened, would have been both intentional and permanent.[11] PGW's reliance on *Panhandle* is surprising in that the Sixth Circuit in that case reversed the district court's order enjoining the threatened abandonment since "... relief should have been sought from the Commission ..." 177 F.2d at 945. See also *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.,* 173 F.2d 784 (6th Cir. 1949).

Even if *Farmland* were not distinguishable on its facts, which it certainly is, it is clear that *Farmland* is not good law, and would not be followed by a court applying the tests of *Cort* v. *Ash.* In the first place, neither the district court nor the court of appeals took cognizance of the numerous cases cited in note 9, *supra,* of this brief, wherein the courts had held that no federal question jurisdiction attached where private parties had sought to establish such jurisdiction under the Act for private suits. It is curious that one of those cases, *McClellan* v. *Montana-Dakota Utilities Co.,* 104 F.Supp. 46 (D. Minn. 1952), *aff'd,* 204 F.2d 166 (8th Cir. 1953), *cert. denied,* 346 U.S. 825 (1953), was decided by the same circuit as decided *Farmland.*[12]

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[11] In *Reynolds Metals Co.* v. *FPC,* 534 F.2d 379, 384 (D.C. Cir. 1976), the D.C. Circuit held that "An 'abandonment' within the meaning of Section 7(b) occurs whenever a natural gas company *permanently reduces* a significant portion of a particular service." (emphasis supplied). In that case, the court concurred in the Commission's determination ". . . that the *permanent* sixty-two percent reduction of Arkla's obligation to transport Reynolds' gas amounted to an abandonment of that service." 534 F.2d at 384. (emphasis supplied). It is clear both from the context of *Reynolds* and from this Court's pronouncements in *United Gas Pipe Line Co.* v. *FPC,* 385 U.S. 83 (1966), that the action of abandonment must also be *intentional.*

[12] See also *FPC* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972), and *Virginia* v. *Tenneco, Inc.,* 538 F.2d 1026 (4th Cir. 1976) (finding federal district courts lack subject matter jurisdiction to entertain actions for violation of the Act).

In the second place, as found by the Third Circuit, it is significant that *Farmland* precedes this Court's *quadripartite* test laid down in *Cort* v. *Ash,* 422 U.S. 66 (1975); and as held by the Third Circuit, it clearly could not pass at least the second and third *Cort* tests for implying a private right of action under a federal statute. In particular, there is no indication of congressional intent or contemplation that a private cause of action be implied even for a recognized unauthorized abandonment.

CONCLUSION

The Court of Appeals below thoroughly considered PGW's arguments and found that implication of a private cause of action contravenes Congressional intent and could seriously disrupt, disable and possibly even destroy the uniform regulatory scheme devised by Congress under the Act. This decision is in accordance with this Court's pronouncements under the Natural Gas Act and accordingly the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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